UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

November 23, 1999

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. 1324a Proceeding
	)	OCAHO Case No. 99A00035
DE LUCA'S MARKET, INC., Respondent.	)	

ORDER GRANTING COMPLAINANT'S
MOTION FOR SUMMARY DECISION

On April 22, 1999, the Immigration and Naturalization Service (complainant or INS) filed a three-count Complaint containing seven alleged paperwork violations of the Immigration Reform and Control Act of 1986 (IRCA), as amended, 8 U.S.C. § 1324a, for which INS assessed civil money penalties totaling $1,280.

In Count I of the Complaint, INS has alleged that De Luca's Market (respondent or De Luca's) violated 8 U.S.C § 1324a(a)(1)(B) by having failed to ensure that the two employees named therein properly completed Section 1 of their Employment Eligibility Verification Forms (Forms I-9). A civil money penalty in the sum of $200 was assessed for each alleged violation, or a total of $400 for both infractions.

In Count II, INS alleged that De Luca's also violated the provisions of 8 U.S.C. § 1324a(a)(1)(B) by having failed to properly complete Section 2 of four Forms I-9. Civil money penalties totaling $700 were assessed, $190 for the first named individual's Form I-9 deficiencies and $170 for the Form I-9 shortcomings for each of the three remaining individuals named in that count.

In Count III, INS alleged that De Luca's also violated the terms of 8 U.S.C. § 1324a(a)(1)(B) by having failed to ensure that the individual named therein properly completed Section 1 of his Form I-9 and also because De Luca's had failed to properly complete Section 2 of that Form I-9. INS assessed a civil money penalty of $180 for that alleged violation.

On June 7, 1999, De Luca's filed an Answer, in which it denied generally all allegations in the Complaint and also requested an adjudicatory hearing.

On October 14, 1999, INS filed a pleading captioned Motion to Amend Complaint in which it moved to strike two of the four alleged paperwork violations in Count II, for each of

which $170 civil money penalties had been assessed, or a total of $340, thereby reducing the total civil money penalties sum to $940 on the remaining five alleged infractions in the three-count Complaint. That motion was granted.

On October 14, 1999, also, INS filed a Motion for Summary Decision.

On November 8, 1999, after having been granted an extension of time in which to file its reply to INS' dispositive motion, De Luca's submitted pleadings captioned Respondent's Opposition to Plaintiff's Motion for Summary Decision and Respondent's Motion for a Directed Verdict. De Luca's Motion for Directed Verdict will be treated as a cross-motion for summary decision.

The OCAHO Rules of Practice and Procedure provide for summary decisions. See 28 C.F.R. § 68.38. The rule is similar to, and based upon, Rule 56(c) of the Federal Rules of Civil Procedure, which governs the entry of summary judgment in federal court. Accordingly, case law interpreting Rule 56(c) is instructive in applying Section 68.38 in OCAHO proceedings. Alvarez v. Interstate Highway Constr., 3 OCAHO 430, at 405 (1992).[1]

A motion for summary decision is properly granted when an examination of "the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed" indicate the absence of any genuine issue of material fact. 28 C.F.R. § 68.38(c). Summary decision is a vehicle for avoiding an unnecessary hearing when there is no genuine issue of material fact. United States v. Zip City Partner, 7 OCAHO 965, at 714 (1997). The Supreme Court deems those issues that affect the outcome of the suit to be material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The moving party has the initial burden of showing the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); United States v. Lamont St. Grill, 3 OCAHO 441, at 480 (1992). The non-moving party must then produce specific material facts which are genuinely at issue. Anderson, 477 U.S. at 250; Fakunmoju v. Claims Admin. Corp., 4 OCAHO 624, at 315 (1994). OCAHO rules mandate that the non-moving party "must set forth specific facts showing that there is a genuine issue of fact for the hearing." 28 C.F.R. § 68.39. Mere denials and allegations will not carry the non-moving party's burden to show that a material fact is in issue. However, once an issue of fact is identified, all facts and reasonable inferences drawn therefrom should be viewed in the light most favorable to the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

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[1]Citations to the Office of the Chief Administrative Hearing Officer (OCAHO) precedents, reprinted in bound volumes 1-7, Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States, reflect consecutive pagination within those bound volumes; pinpoint citations to Volumes 1-7 are to the specific pages, seriatim, of the specific entire volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 7, however, are to pages within the original issuances.

The pertinent provisions of IRCA, 8 U.S.C. § 1324a, imposes affirmative record keeping, or paperwork, duties upon employers including preparing and retaining Forms I-9, officially known as the Employment Eligibility Verification Form, for each employee hired after November 6, 1986. Employers of three or more persons are further required to make those forms available to INS for inspection and audit purposes. 8 U.S.C. § 1324a(b). The requirements for verifying employment eligibility are set forth in 8 C.F.R. § 274a.2 and apply to the proper completion of Sections 1 and 2 of the Form I-9.

Good faith compliance may relieve an employer of liability for technical or procedural failures to comply with the affirmative employment verification requirements. See 8 U.S.C. §1324a(b)(6). On April 7, 1997, the INS published proposed rules to implement the good faith compliance provision. See 63 Fed. Reg. 16909, 16912. That provision "will apply to all cases arising out of inspections conducted on or after September 30, 1996." 63 Fed. Reg. 16909, 16910. The INS conducted its inspection of the pertinent Forms I-9 at De Luca's place of business on March 24, 1997. Accordingly, the good faith compliance provision is applicable to these facts.

Although that provision applies to the instant facts, the proposed definition of procedural and technical failures does not include any of the violations which INS has alleged in Counts I, II, or III. The failure to provide the document expiration date of a List A, B, or C document is covered by the proposed rules, but only in the event that the employer has retained and presented a legible copy of the proffered document with the pertinent Forms I-9. Id. The other alleged violations at issue are neither included nor mentioned in the proposed rules.

The applicable implementing regulations further describe an affirmative good faith defense which provides that an employer "who shows good faith compliance with the employment verification requirements of § 274a.2(b) of this part shall have established a rebuttable affirmative defense. . . ." 8 C.F.R. 274a.4. But that section applies only in cases in which knowing hire violations had been alleged and none of the five remaining allegations in the Complaint at issue concern knowing hire violations. Instead, all five remaining alleged violations concern paperwork infractions. Similarly, the affirmative defense provided for in 8 C.F.R. § 274a.4 has no application under these facts.

De Luca's Motion for a Directed Verdict refers to its good faith compliance and urges that the violations were merely technical or procedural, but De Luca's has failed to specify the statutory underpinning of its claimed good faith compliance defense. Upon examining the potential good faith defenses, it is found that the violations at issue are not within the good faith compliance provision of 8 U.S.C. §1324a(b)(6). And as noted previously, the good faith affirmative defense described in 8 C.F.R. 274a.4 cannot be applied to these five paperwork violations since the Complaint at issue does not allege a knowing illegal hire type violation.

De Luca's and INS agree, with the exception of a single, inapplicable factual issue, that there remains no genuine issue of material fact. That inapplicable factual issue is whether the U.S.

Department of Labor (DOL) resorted to the improper use of a subpoena in order to obtain documents from De Luca's and whether any of those documents resultingly provided to DOL contained copies of relevant Forms I-9. But as noted earlier, that irrevelant fact has no bearing upon the five alleged violations which remain at issue and for that reason cannot be viewed as a genuine issue of material fact. See Anderson, 477 U.S. at 248. Instead, that fact is only included in the record as background regarding the manner in which De Luca's alleged proscribed record keeping practices came to the attention of INS.

In support of its Motion for Summary Decision, INS has provided the following documentation: the Declaration of INS Special Agent Dana Fiandaca; a copy of the Notice of Inspection, Exhibit A; a list of De Luca's employees together with their corresponding dates of hire, Exhibit B; five Forms I-9, Exhibits E through I; and Complianant's First Set of Interrogatories and respondent's corresponding answers, Exhibits J and K, respectively. De Luca's, in support of its Motion for a Directed Verdict, has provided one document namely, the Declaration of Robert Aiello, its president.

This record, including admissions, discloses that the INS has established a prima facie case regarding the allegations in Count I, in which it alleged that De Luca's failed to ensure the proper completion of Section 1 of the Forms I-9, by two employees, George Panagopoulos and Oscar Morales. In its answer to interrogatories, De Luca's has admitted having hired both of those named individuals. In addition, De Luca's list of employees and the corresponding dates of hire indicate that both of those employees were hired after November 1, 1986, since Mr. Panagopoulos had been hired on September 15, 1994, and Mr. Morales' hiring date was October 19, 1994.

In addition, an examination of the relevant Forms I-9 reveals that two employment status boxes were checked on Mr. Panagopoulos's Form I-9 and that the required employment status box had not been checked on Mr. Morales' Form I-9. Accordingly, INS has demonstrated that neither individual was then authorized to work in the United States. As provided for under the pertinent provisions of IRCA, it was De Luca's duty to ensure that both of those employees had provided the required employee attestation as to their identify and employment eligibility, and De Luca simply failed to do so.

The record also shows that in Count II INS has established a prima facie case that De Luca's failed to complete Section 2 of Forms I-9 for those two employees named in that count, each of whom had been hired after November 6, 1986. That count initially contained the names of four individuals but INS has subsequently determined that two of those four original alleged violations were technical and procedural. Accordingly, and as noted previously, INS dismissed those two charges.

De Luca's has admitted in its answers to INS' first set of interrogatories, and as De Luca's employee roster confirms, that Raymond Leetch and Julie Jenkins were employees of De Luca's. Further, De Luca's indicates that Mr. Leetch was hired on November 7, 1989, and that

Ms. Jenkins was hired on November 2, 1996. It has also been established that Mr. Leetch was not authorized to work in the United States.

Ms. Jenkins' Form I-9 did not include any information relating to a List B identity document but her Form I-9 clearly discloses that she had provided two List C employment eligibility documents, an original social security card and her birth certificate. But proper completion of Forms I-9 require both a List B identity document and a List C employment eligibility document, unless a List A dual purpose identity/employment eligibility document was provided, instead. See 8 C.F.R. § 274a.2(b)(1)(v). Therefore, providing two List C employment eligibility documents cannot overcome the deficiency of having clearly failed to include a required List B identity document for Ms. Jenkins.

INS has established that Section 2 of Mr. Leetch's Form I-9 does not include the required license expiration date in the List B identity document section. The implementing regulations provide that in completing Section 2 of the Form I-9, "[t]he identification number and expiration date (if any) of all documents must be noted in the appropriate space provided on the Form I-9." 8 C.F.R. § 274a.2(b)(1)(v).

INS has presented a prima facie case that De Luca's violated its paperwork obligations concerning Section 2 of the Forms I-9 for both Ms. Jenkins and Mr. Leetch. And those two proven violations cannot reasonably be viewed as being infractions which are merely technical or procedural in nature.

With respect to Count III, INS has also presented a prima facie case that De Luca's failed to ensure proper completion of Section 1 and failed to properly complete Section 2 of the Form I-9 pertaining to Mark Savini.

De Luca's admits having hired Mr. Savini on October 19, 1994, but the attestation in Section 1 of Mr. Savini's Form I-9 was not completed and in Section 2 of that form the expiration date of Mr. Savini's driver's licence was not shown. Similarly, neither of those obvious infirmities can reasonably be regarded as being of a technical or procedural character.

Having found that INS has proven the five remaining paperwork violations, appropriate civil money penalty sums must be assessed for each of those proven infraction.

Five statutory criteria which must be given due consideration in determining the appropriate civil money penalties for paperwork violations such as the ones at issue namely, the size of the business, the employer's good faith, seriousness of the violation, whether the individuals were unauthorized aliens, and the history of previous violations. 8 U.S.C. § 1324a(e)(5).

The civil money penalties which must be assessed for each paperwork infraction range from the statutorily-mandated minimum sum of $100 to the maximum sum of $1000. See 8

U.S.C. § 1324a(e)(5). Since the INS alleges five violations, the minimum total sum which INS must assess under these facts is $500 and the maximum allowable total levy is $5000.

In its Motion for Summary Decision, INS presented argumentation regarding the imposition of the proposed civil money penalties. Meanwhile, De Luca's, despite having been granted an extension of time within which to oppose that motion, has inexplicably failed to address the imposition of penalties, despite having been afforded that opportunity to do so.

In justifying the proposed civil money penalty sums, INS alleges that De Luca's is a business of moderate size. De Luca's declined to answer several interrogatories relating to its size, including revenue, number of employees, and real estate holdings. However, it has been shown that De Luca's operates two markets, one of which employs 38 persons. INS requests a slight increase upward from the $100 statutory-mandated minimum sum based upon De Luca's moderate size.

Consideration of the second criterion, good faith, requires an examination of more than De Luca's mere failure to fully comply with the regulations, since failure to comply alone does not support a finding of absence of good faith. United States v. Catalano, 7 OCAHO 974, at 870 (1997). The INS alleges that De Luca's principals Robert and Virgil Aiello were uncooperative during its attempted interviews since it had denied INS the use of the worksite for the purpose of interviewing four employees. However, De Luca's did provide to INS the home addresses of those individuals and presented a viable reason, namely space limitations, for having objected to the onsite interviews. The INS also seeks a slight increase from the $100 civil money penalty sum minimum based upon De Luca's perceived lack of good faith.

The third factor, the seriousness of the violations, considers whether and to what extent the violation materially affects the purpose of the employment eligibility verification process. INS urges an enhanced amount, beyond the statutory minimum, based on the seriousness of these violations. INS also notes that in two instances the individuals attestations either failed to indicate the required employment eligibility status entirely or inadequately and improperly indicated both citizenship and lawful permanent resident status.

The fourth factor to be considered is that of determining whether the employees were unauthorized aliens. Three individuals, two in Count I and one in Count II, were determined to have been unauthorized to work in the United States. For that reason, INS quite properly also seeks a civil money penalty sum in excess of the $100 minimum.

The final criteria to which due consideration must be given is that of determining an employer's history of violations of this nature. De Luca's has no prior record of IRCA violations.

The two violations in Count I, De Luca's failure to ensure proper completion of Section 1 of the Forms I-9 for two individuals, warrant the assessment of $200 civil money penalty sums for each of those proven infractions, as previously assessed, or a total of $400 on that count.

For the two proven violations in Count II, INS proposes a $190 penalty relating to the violation on Mr. Leetch's Form I-9 namely, a missing driver's licence expiration date. The enhancement is proper because of Mr. Leetch's unauthorized employment status. For the violation arising out of the preparation of Ms. Jenkins' Form I-9, i.e. the absence of a List B identity document, the INS proposes a $170 assessment. That increase from the statutory $100 minimum is also justified. The proposed $360 total civil money penalties for the two violations alleged in Count II are therefore being affirmed, also.

Similarly, the proposed civil money penalty amount of $180 for the single violation in Count III is found to have been reasonably levied since the required attestation in Box 1 of the pertinent Form I-9 was simply not provided.

Accordingly, the total civil money penalty sum totaling $940 for the five proven paperwork violations assessed against De Luca's in Counts I, II, and III, is hereby being affirmed.

Order

Complainant's Motion for Summary Decision is granted.

De Luca's is hereby ordered to pay a total civil money penalty sum of $940 for the five proven paperwork violations, allocated as follows: $200 for each of the two proven violations in Count I, or a total of $400 on that count; $190 for that violation demonstrated in Count II concerning Mr. Leetch; and $170 for that proven violation pertaining to Ms. Jenkins in that count; and $180 for the single proven infraction in Count III.

Joseph E. McGuire
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 23nd day of November, 1999, I have served copies of the foregoing Order Granting Complainant's Motion for Summary Decision on the following persons at the addressees shown, in the manner indicated:

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